

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-6214

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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

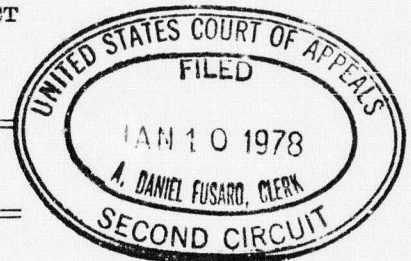
SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,
against

ROBERT L. VESCO, et al.,
Defendants,

WADE S. MALHAS, IRVING HOROWITZ, MARTIN JACOBY,
CHARLES BIRBARA, CORNELIUS A. HUBNER, MURRAY DRYER,
PHIL BIRBARA, N. E. BURGESS and WILLIAM ZEIDMAN,
Intervenor-Appellants.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK
(72 Civ. 5001)

BRIEF FOR INTERVENOR-APPELLANTS



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WILLIAM ZEIDMAN,

Intervenor-Appellants.

On Appeal from an Order of the United States
District Court For the Southern District of
New York (72 Civ. 5001)

BRIEF FOR INTERVENOR-APPELLANTS

ISSUES ON APPEAL

(1) Should persons serving as Court-appointed directors pursuant to the equity powers of a federal court be precluded from serving as officers or directors of the corporation when their period of court-stewardship terminates in order to ensure the absence of conflicts of interest during the court-stewardship and to avoid the appearance of impropriety?

(2) Did the District Court err in adopting the Plan and Recommendations of the Special Master which permits the Court-appointed directors of International Controls Corp. to succeed themselves as directors at a forthcoming election of directors by ICC stockholders?

Statement of the Case

A. Introduction

This is an appeal by the Intervenor-Appellants from an order* of the United States District Court for the Southern District of New York (Stewart, J.) entered on November 22, 1977. (A-500)** This order approved and adopted a plan of election of directors for International Controls Corp. (hereinafter "ICC") which had been recommended by a Court-appointed Special Master. (Id.) The Intervenor-Appellants (hereinafter "Intervenors") are stockholders of ICC who, pursuant to an order entered on December 19, 1977, are parties to this action for all purposes relating to a forthcoming stockholders' meeting for the election of directors of ICC. (A-502) This meeting will be the first meeting of ICC stockholders and the first election of ICC directors by stockholders in five years. (A-445) The meeting and election will be supervised by the Special Master. (A-436, 438, 500)

* The order is a post-judgment order, as the final judgment in this action was entered on March 16, 1973. See discussion infra at p. 4.

* References are to pages of the Joint Appendix.

This appeal presents the unprecedented situation that Court-appointed directors of a publicly-held corporation are seeking, over the objection of stockholders, to run as candidates for election as directors upon the termination of their tenure as Court-appointed directors. As will be seen, this appeal also follows an extraordinary series of attempts by the Court-appointed directors of ICC to use the advantages of their judicially created offices, including corporate funds, to enhance their chances of retaining their directorships when the five year period of judicial supervision of ICC ceases. This appeal from the District Court's order is based upon 28 U.S.C. §1291.

B. The Action

This action was commenced on November 27, 1972 by the Securities and Exchange Commission (hereinafter the "Commission") against Robert L. Vesco (hereinafter "Vesco") and 41 other defendants, including ICC. (SR-1)* The Commission's complaint alleged that Vesco and the other defendants had looted certain offshore investment companies, simultaneously utilizing ICC as a vehicle for the looting while defrauding ICC itself. (Id.) To remedy this fraud, the Commission's complaint requested the appointment of a receiver for ICC based upon the allegations that ICC's Vesco-controlled management had engaged in violations of the Securities Exchange Act of 1934 and that these violations resulted in injuries to ICC, its stockholders and the public. (Id.)

* References are to the Supplemental Record on Appeal.

C. The Consent Settlement and the Substitution of
Court-appointed Directors for Directors Elected
By ICC Stockholders

Subsequent to the filing of the complaint, a settlement was reached between ICC and the Commission and on March 16, 1973, after the filing of a Consent Settlement by ICC (the "Consent Settlement") (A-20), the District Court (Stewart, J.) entered a Final Judgment of Permanent Injunction and Appointment of Special Counsel and Directors (International Controls Corp.) (hereinafter the "Final Judgment"). (A-11)

In lieu of a receiver for ICC, the Final Judgment, among other things, ordered the appointment by the Court of:

(1) "a new interim independent board of directors for International Controls, none of whom shall previously have served as a member of the board of directors of International Controls" (A-16); and

(2) a Special Counsel satisfactory to the Commission to "conduct a full investigation and arrangement for and oversee an accounting into the financial and other affairs of International Controls, and report to this Court and plaintiff Commission his findings and recommendations for action."
(A-14)

Pursuant to the Consent Settlement and the Final Judgment, the then members of the Board of Directors of ICC resigned and the Court appointed John Mosler, Allen M. Shinn, Charles S. Desmond, George D. Gould and Joseph W. Weiner* as interim directors of ICC. (A-184) Also pursuant to

* Mr. Weiner died in January, 1976 and has not been replaced.
(A-306)

the Final Judgment, David M. Butowsky was appointed Special Counsel. (A-63)

D. The Management of ICC by the Court-Appointed Directors And the Suspension of the Rights of ICC Stockholders For the Past Five Years

The Final Judgment provided that ICC was to be managed by these new interim directors under continuing court supervision. The relevant provision of the Final Judgment reads as follows:

"Said interim board of directors shall consist of at least three persons, shall be satisfactory to plaintiff Commission, shall replace the existing board of directors of International Controls, and shall have full power under applicable corporate law to conduct the affairs of International Controls in conjunction with the Special Counsel, subject to the terms and conditions of the Final Judgment. Any dispute between the Special Counsel and the board of directors shall be submitted to this Court for determination. The board of directors appointed pursuant to this paragraph shall hold office until further order of this Court upon application of plaintiff Commission and until the shareholders of International Controls have elected a new board of directors in compliance with the provisions of the Securities Exchange Act of 1934." (A-16-17)

For the following five years and continuing to date, the new Court-appointed directors have managed ICC while ICC stockholders awaited the time when they would be permitted to elect a board of directors for ICC. (A-482) During this lengthy period under Court-appointed directors no meeting of ICC stockholders has been held and the composition of ICC's board of directors has (except for the death of Mr. Weiner)

remained unchanged. (A-308-309) ICC stockholders have had no voice or vote in ICC affairs during this entire period. (A-482) One of the Court-appointed directors, Allen M. Shinn (hereinafter "Shinn") has also served as President and Chief Executive Officer of ICC during this period. (A-49) Pursuant to the Final Judgment, the Court-appointed directors are insulated from both the electoral and the removal processes of Florida corporate law and are to be liable to ICC stockholders only for acts constituting "gross negligence". (A-17)

E. The Intervenor's Efforts To Bring About a Meeting of Stockholders

In January 1976, a group of ICC stockholders, then owning in the aggregate more than 179,000 shares of ICC common stock*, sought leave to intervene in this action to bring about a meeting of ICC stockholders for the election of a board of directors and a return of the management of ICC to its stockholders. (A-24) Although nearly three years had then passed since entry of the Final Judgment, both the Court-appointed directors and the Special Counsel opposed Intervenor's motion. (A-42) By order dated January 30, 1976, action on Intervenor's motion was deferred pending resolution of the appeal in International Controls Corp. v. Robert L. Vesco, et al., (73 Civ. 2578). (A-48)

One year later, the interim Court-appointed directors and the Special Counsel still opposed the efforts of the

* The Intervenor's now own more than 244,600 shares of ICC common stock.

Intervenors to effect a stockholders' meeting on the grounds, inter alia, that more time was needed to complete the Special Counsel's report, to eliminate the Vesco management as an influence and to dispose of claims asserted against the corporation. (A-49-66)

The Commission filed Recommendations on March 8, 1977 suggesting that Intervenor's motion for a stockholders' meeting be granted on the following timetable: (1) the Special Counsel's Report be filed by June 30, 1977; (2) a report by the interim Board of Directors on the present status and future prospects of ICC be filed by August 31, 1977; and (3) a stockholders' meeting of ICC be held no later than November 30, 1977.* (A-107)

An order adopting the Recommendations and the time schedule proposed by the Commission was entered on April 19, 1977, with the dates for the respective reports of the Special Counsel and the board of directors set back by two months and a stockholders' meeting scheduled to be held by December 20, 1977 at which ICC stockholders would at long last elect directors of their corporation. (A-145-148)

F. The Actions of the Court-appointed Directors Which Led to the Appointment of a Special Master To Supervise the Election of Directors

In July 1977, one of the Intervenors, Dr. Wade S. Malhas, (hereinafter "Malhas"), then the owner of more than

* The Commission's Recommendations specified that "[p]rior to the meeting a solicitation of proxies should be made in the light of all information furnished by the Report of Special Counsel and the Board Report." (A-108)

75,000 shares of ICC common stock, filed a Schedule 14-B with the Commission, thereby giving notice that he was considering soliciting proxies for election to the board of ICC at the stockholders' meeting scheduled in the April 19, 1977 Order. (A-170)

In flagrant violation of the spirit and letter of the April 19, 1977 Order and in a patently obvious effort to thwart Malhas in his contemplated solicitation of proxies, the Court-appointed board of directors, without notice to the Commission, the Court, the Intervenor or other ICC stockholders, held a meeting on August 18, 1977 at which they set an October 18, 1977 date for the first meeting of ICC stockholders in more than five years. (A-178) This new proposed meeting date was more than two months earlier than the date set in the April 19, 1977 Order.* The interim board advanced the date for the meeting despite the fact that the Special Counsel's Report had not been completed by the August 15, 1977 deadline set in the April 19, 1977 Order. (A-151)

At this same August 18, 1977 meeting, the interim directors set a record date of August 31, 1977 - only twelve

* As part of their justification for this action, the directors asserted below that the April 19, 1977 Order specified that the meeting be held by December 1977 and that abruptly advancing the meeting date by two months was, therefore, consistent with the April 19, 1977 Order. (A-178) Since neither the Special Counsel's Report nor the Board Report contemplated by the April 19, 1977 Order had been filed, this argument is certainly disingenuous. In any event, the time-table established in the April 19, 1977 Order obviously did not contemplate an October 1977 meeting.

days after the board issued a press release announcing their actions. (A-230) As indicated above, these actions were taken by the Court-appointed directors without notice to or consultation with the Court or the Intervenor, who were obviously relying upon the schedule set forth in the April 19, 1977 Order, which contemplated that the long-awaited meeting of ICC stockholders would be held in December. In fact, the Intervenor did not learn of the new meeting date until August 22, 1977 and then only from an article in the Wall Street Journal. (A-162)

By Order to Show Cause, returnable August 30, 1977, Intervenor asked for a postponement of the meeting until both the Board Report and the Report of the Special Counsel had been filed. (A-52) The interim Court-appointed board of directors vigorously opposed the Intervenor's motion. The opposition papers served by ICC included the Report of the Court-appointed directors called for in the April 19, 1977 Order and brazenly presented preliminary proxy materials for the solicitation of proxies for a "management slate" of directors composed, among others, of the four Court-appointed directors themselves, their lawyer, Milton Gould, and various other persons, some of whom served as directors for companies which the Court-appointed directors also served as directors. (A-223)

These preliminary proxy materials revealed for the first time that the Court-appointed directors planned to nominate themselves as the "new" directors to be elected by ICC stockholders. (A-225) In fact, the preparation of

these preliminary proxy materials prior to submission to the Court of the Board Report indicated that the Court-appointed directors had at some earlier date secretly decided to take steps to cause their own election, deliberately keeping the Commission, the Court and the Interveners in the dark. Moreover, it was obvious that the Court-appointed directors did not even intend to seek Court approval for this self-nomination. (A-223) In using corporate funds for the preparation of the preliminary proxy material, the Court-appointed directors had already begun to use the corporate machinery for their own personal interests. Obviously, the Court-appointed directors perceived no impropriety in acting like stockholder-elected incumbents and intended to utilize corporate funds to perpetuate themselves and their nominees as ICC directors, thereby transforming their Court-stewardship as interim directors into personal sinecures as permanent ICC management.

The remainder of the proposed "management" slate of directors proposed by the Court-appointed directors included the following persons: (1) Milton S. Gould, a senior partner in the firm of Shea Gould Climenko & Casey which had represented ICC during the stewardship of the Court-appointed directors; (2) Elmer A. Sticco, who had been compelled to resign as a director in 1973 pursuant to the Final Judgment; (3) Bernard L. Schwartz, who, according to the preliminary proxy material, is Chairman of the Board and Chief Executive Officer of Loral Corporation

(Mr. Shinn, a Court-appointed interim director, has been a director of Loral Corporation since 1973 according to the ICC Form 10-K for the year ending December 31, 1976); (4) J. Hugh Liedtke, who, according to the preliminary proxy material is Chairman of the Board and Chief Executive Officer of Pennzoil Co. (Mr. Shinn has been a director of Pennzoil since 1970 according to the ICC Form 10-K for the year ending December 31, 1976); (5) William H. Burgess; and (6) Harvey L. Karp. (A-225-226) Obviously, this "slate" was not put together overnight.

Only two members of this proposed slate owned any ICC stock. (Id.) The interim Directors themselves own no stock of ICC because, apparently perceiving a conflict of interest, "they deem it inappropriate as Court-appointed directors to purchase such stock." (A-226) The preliminary proxy material also revealed that the interim Directors had retained a firm of proxy solicitors, D. F. King & Co., and intended to spend company funds to assist their solicitation of proxies.

Also at this August 18, 1977 meeting, the Court-appointed directors voted to amend the by-laws of ICC to double the required number of directors from five to ten. (A-316) This change in the size of ICC's board was effected without any explanation to the Court or to ICC stockholders, much less with any approval by the Court or authorization by the stockholders. All of the actions taken by the Court-appointed directors at this August 18, 1977 meeting -- unexpectedly advancing the date of the stockholders'

meeting, abruptly setting a record date only a few days away and doubling the Board size -- were obviously intended to aid their efforts to hold on to their seats while increasing the difficulty and the expense for Malhas and others to run a competing slate.* The Court-appointed directors had clearly determined to use every available tactical advantage to remain in office.

Immediately upon learning of the intention of the Court-appointed directors to transmute the Final Judgment into a judicial license to cause themselves to be elected directors by ICC stockholders, the Intervenor brought on a motion questioning the Board's actions and seeking an order which would (i) prohibit the Court-appointed directors from succeeding themselves in office at the next election of directors of ICC; (ii) prohibit the Court-appointed directors from using company funds to solicit proxies on behalf of themselves and those affiliated with them for the next election of directors of ICC; (iii) direct that a plan be devised for the orderly transition of the judicial stewardship of ICC to an independent board of directors elected by ICC stockholders;

* Obviously, it would be more difficult for Malhas and other ICC stockholders to put together a ten person "slate" than a five person "slate". Also, ten is precisely the number required to make the four Court-appointed directors a technical minority on the board. The Court-appointed directors used this technical "minority" position as a justification for permitting them to run for election (A-276), as if the Court would forget that they had increased the size of the board themselves and had hand-picked their "running mates".

(iv) rescind the action of the Court-appointed board of directors setting a record date of August 31, 1977 and a meeting date of October 18, 1977 for a meeting of the ICC stockholders; and (v) direct that a meeting of ICC stockholders be held for purposes of electing directors after approval of a plan for orderly transition by the Court and dissemination to stockholders. (A-301)

Predictably, the interim Board vigorously opposed Intervenor's Motion and offered numerous rationales for their actions.* (A-318) At the invitation of the Court, the Commission then submitted recommendations that an independent Special Master be appointed to prepare a Plan of Election "for effecting the transition from Court-appointed to elected directors", and thereafter to supervise the electoral process. (A-371) Under this proposal, the question of the eligibility of the Court-appointed directors to run for election was to be left to a Special Master, who would have "[r]easonable discretion to determine the eligibility of candidates" (A-372) The Court followed the Commission's Recommendations and Arnold Bauman was appointed as the Special Master. (A-436)

* In justification of these efforts, the Court-appointed directors alleged, inter alia, that they were serving as directors in accordance with Florida law and ICC's certificate of incorporation and by-laws to fill vacancies created by the en masse resignation of ICC directors pursuant to the Consent Settlement. (A-319) Incredibly, they considered that they were entitled to the tactical advantages of incumbents in a proxy solicitation contest and that the judicial creation of their directorships imposed no limitations because it did not specifically prohibit such conduct. (A-319)

G. The Special Master's Report and the District Court's Order Which Specifically Permit the Court-appointed Directors To Run For Election

In brief, the "Plan and Recommendations of Special Master" (hereinafter the "Plan") provided that (a) no funds of ICC were to be expended in connection with the election except in connection with activity by the Special Master; (b) communications with ICC stockholders by those interested in the election prior to commencement of solicitation were to be submitted to the Special Master for approval, with certain exceptions; (c) the Board size was to be set at ten, effective as of the stockholders' meeting; (d) the Special Master would solicit nominations for directors from ICC stockholders and prepare an election statement for distribution to stockholders listing all nominees found eligible; and (e) the first meeting of ICC stockholders since 1972 would be held on April 25, 1978. (A-445-471)

With respect to eligibility, the Special Master adopted several detailed and strict criteria to exclude not only anyone connected with Vesco but anyone else deemed by the Special Master to be a "person of questionable integrity." (A-454) The criteria adopted by the Special Master bar many categories of persons who would normally be permitted to seek election as a director and accord the Special Master considerable discretion concerning eligibility. (A-454) Yet, despite the Intervenor's opposition to the proposed self-perpetuation of the Court-appointed directors' incumbency and the

dangerous precedent such action would set, the Special Master declined to rule the Court-appointed directors ineligible for election and the Plan contemplates that they will pass scrutiny under its otherwise strict criteria. (A-456) Moreover, the Plan does not even restrict the Court-appointed directors from serving (or, in the case of Shinn, from continuing to serve) as officers of ICC.

In rejecting the Intervenors' opposition to the Court-appointed directors as candidates, the Plan stated:

"I am not persuaded by the argument of the Proposed Intervenors that it would be inappropriate to allow the Court-appointed directors to run for election to the new Board. The possibility exists, moreover, that the exclusion of the Court-appointed directors (1) would deprive the Stockholders of the opportunity to benefit from the experience and knowledge of ICC's affairs accumulated by the Court-appointed Board and (2) could result in the Election going by default to the candidates of the Proposed Intervenors or any other group which may hereafter become interested in the Election. I believe it is entirely appropriate to preserve for the Stockholders the opportunity to decide whether the election of the present Directors to the new Board is in their best interests." (A-456)

In their objections to the Plan, the Intervenors reiterated their opposition to permitting Court-appointed directors to run for election, contending that the recognized conflict of interest which prevented the interim directors from purchasing stock in ICC should bar their nomination as directors for a stockholder-elected Board and that it was improper for Court-appointed directors, who had been placed in

their directorial capacity by the Court, to utilize (or even appear to be utilizing) the advantages of their judicially created incumbency for their own personal gain. (A-482)

The very resistance by the Court-appointed directors to the Intervenor's position and their use of ICC counsel and company funds to argue their right to run for election reveal the conflicting interests to which these Court-appointed directors are subject if permitted to seek election as directors. The judgment of the Court-appointed directors is inevitably clouded on whether their position regarding the election is truly in the best interests of ICC or is adopted to further their candidacy. Even ICC counsel is subject to the same conflict of interest and cannot be considered independent, as Milton S. Gould, a member of the firm, will run on the "slate" proposed by the Court-appointed directors.* (A225)

By Memorandum Decision and Order dated November 22, 1977, the Court adopted the Plan, with certain amendments not relevant to this appeal. (A-500) As a result, the Court-appointed directors, Mr. Gould and their "running mates", are to be candidates at the forthcoming election of directors by ICC stockholders.**

* According to the questionnaire completed and returned to the Special Master, Mr. Gould purchased 11,500 shares of ICC common stock on December 7, 1977.

** Since the date of Judge Stewart's Order, two of the original members of the "management slate" proposed by the Court-appointed directors have determined not to seek election (Harvey L. Karp and J. Hugh Liedtke). These two have been replaced by four other candidates.

ARGUMENT

I

THE DISTRICT COURT'S ORDER, BY PERMITTING THE COURT-APPOINTED DIRECTORS TO SEEK ELECTION AT THE FORTHCOMING ELECTION OF DIRECTORS BY ICC STOCKHOLDERS, THREATENS TO TRANSFORM THE INTERIM COURT STEWARDSHIP OF ICC INTO PERMANENT MANAGEMENT WHICH IS AN ABUSE OF THE EQUITY POWERS OF THE FEDERAL COURTS AND THE REMEDY OF JUDICIAL APPOINTMENT OF DIRECTORS

- A. The Final Judgment and the Consequent Management of ICC by Court-Appointed Directors for Five Years Were Drastic Remedial Actions in Derogation of Florida Corporate Law and the Rights of All ICC Stockholders.

The Court-appointed directors tried to justify their unsuccessful efforts to effect their own election at the stockholders' meeting at company expense with the response that they constitute a normal (i.e., duly elected) Board of Directors of ICC and, as such, are free to utilize the corporate machinery of ICC to secure their own "re-election" to office. (A-318-319) In their efforts to perpetuate themselves and rebut Intervenor's opposition, the Court-appointed directors advanced the theory that the interim directors were simply elected to fill vacancies in accordance with the ICC charter, by-laws and Florida corporate law. (A-319) Apparently irrelevant in their view were the circumstances requiring the resignation en masse

of the prior board, the creation of a new "independent" board, the disenfranchisement of ICC stockholders for five years, the suspension of other provisions of Florida corporate law and the fact that all of this had been accomplished by order of a federal court at the instance of the Commission.

The argument that the Final Judgment contemplated the Court-appointed directors were to be considered equivalent to elected directors of ICC ignores the import of the Final Judgment, which conditioned the Board's power to operate the Company on working "in conjunction with the Special Counsel" and subjected the Board's action to continuing supervision by the Court.* These directors of ICC are, by any measure, far from a normal board of directors if for no other reason than that their very appointment and continuation in office necessarily suspended the powers and authority traditionally accorded stockholders, including inter alia, the power to elect

* The applicable paragraph of the Final Judgment provided that:

"Said interim board of directors . . . shall replace the existing board of directors of International Controls and shall have full power under applicable corporate law to conduct the affairs of International Controls in conjunction with the Special Counsel, subject to the terms and conditions of this Final Judgment." (A-16)

directors or remove them from office.* In this regard, the Final Judgment provided:

"No individual director appointed pursuant to this provision shall be discharged or replaced or any additional directors be appointed or elected except upon application to this Court by plaintiff Commission in accordance with the provisions of this paragraph." (A-17)

Another indication of the extraordinary nature of the remedy of establishing an interim board of directors is the freedom from liability (except for gross negligence) enjoyed by the interim directors under the Final Judgment. (A-17) This is not the "ordinary prudent person" test of the Florida statute which governs the accountability of a corporation's directors to its owners, the stockholders. Florida Statutes, §607.111(4) (1975). This insulation from liability for their conduct reflects the fact that interim

* A number of commentators have recognized the deviation from the traditional shareholder-management relationship represented by the phenomenon of court-appointed directors. See, e.g., Comment, Equitable Remedies in SEC Enforcement Actions, 23 U. Penn. L. Rev. 1188, 1206 (1975): "Thus, by court order and at the Commission's request, a board of directors that cannot be voted out or removed by normal shareholder action is installed, and is accountable only for actions which are grossly negligent"; Comment, Court-Appointed Directors: Ancillary Relief in Federal Securities Law Enforcement Actions, 64 Georgetown L.J. 737, 742-43 (1976): ". . . court-appointed management differs from other forms of ancillary relief in its intrusion into the traditional state-governed process by which stockholders hold the power to select the managers of the enterprise."

directorships such as those in this case are created by the Court for the difficult task of straightening up after wrongdoers and that these agents of the Court are accountable directly to the Court and only to the stockholders in the case of "gross negligence".

The Special Master recognized the unique status of the Court-appointed directors in his Plan and Recommendations, where he stated:

"The Election will not, however, be an ordinary election of directors by the shareholders of an ordinary Florida corporation. The Election, instead, represents an important step in the termination of judicial proceedings instituted to deal with the consequences of a massive securities fraud allegedly committed by Vesco and his associates, of which ICC was both the victim and the vehicle. The Court has, in effect, for the last four years suspended the application to ICC of certain rules normally applicable to Florida corporations including the rules applicable to the election of directors." (A-454)

The label "directors" should not obscure the fact that the Court-appointed directors of ICC are agents of the Court and are in many ways equivalent to court-appointed receivers. In fact, these directors received their positions when the Commission accepted judicial supervision of

Court-appointed directors as an adequate substitute for the receivership sought in the Commission's complaint.* Since it is obviously impossible for a federal district court judge to supervise the day to day business of a corporation like ICC, the judicial supervision of ICC has, for almost the past five years, been as a practical matter conducted by these directors, as agents of the Court, in cooperation with the Court-appointed Special Counsel.

While there is no specific statutory authority for the judicial appointment of directors and the corollary suspension of the rights of stockholders, the Commission has taken the position that the power of a federal court to appoint interim directors derives from its power to appoint a

* The interim Directors previously have conceded as much. In submitting their views on Intervenor's application for a meeting, the Directors recognized that:

"The remedy of Special Counsel and a Court appointed Board was consented to by the Corporation because of the adverse effect the appointment of a receiver would have had upon the going businesses operated by the Corporation. * * * Our obligation as Court appointed directors was not merely to manage its affairs for the benefit of the holders of its common stock, but to aid in disclosure, regularization of operations and assertion of claims for the benefit of all security holders, creditors and persons who had been injured by reason of the matters alleged in the SEC complaint much the way a receiver would have acted if a receiver had been appointed." (A-49-50)

receiver.* Indeed, Stanley Sporkin, the Commission's Director of Enforcement, has analogized the appointment of interim directors to the appointment of a receiver, specifically in terms of the "protection" afforded by use of the mechanism of interim directors, while avoiding defaults in loan agreements and the like which would automatically result from the imposition of a "receivership":

"We have also worked out a form of relief which is a little bit short of a full receivership. In a number of cases where we have asked for receiverships, we have been persuaded to accept something short of a receivership, but which gives the public perhaps as good as or better protection and which at the same time permits the company to remain viable and avoid various acceleration events that sometimes result from the appointment of a receiver. In the Clinton Oil and International Control Corp. cases, for example, we settled for court-appointed directors and the appointment of a special counsel who was to conduct an investigation and bring civil actions against those persons who may be indebted to the corporate entity by virtue of their wrongdoing. In both those cases we also determined that certain of the principals had forfeited their right to manage a public company and required that they terminate their management positions." Sporkin, SEC Developments in Litigation and the Moulding of Remedies, 29 Bus. Law. 121, 123 (1974).

* "To support its position that federal courts have the equitable power to appoint directors, the Commission has analogized to the longstanding practice of court appointment of receivers. Despite the absence of express statutory authorization for appointment of receivers, federal courts consistently have recognized their power to appoint receivers to corporations found in violation of federal securities laws. Reasoning that court appointment of directors is a less drastic form of relief than receivership, the SEC apparently maintains that judicial power to appoint directors follows a fortiori from its power to appoint receivers." Comment, Court-Appointed Directors, supra, 64 Georgetown L.J. at 741.

The suspension of the right of stockholders to elect (or remove) the interim directors of their company conflicts with basic corporate concepts, the clear intent of the Exchange Act and with the enunciated intent of the Commission to encourage stockholder participation in corporate management and particularly in the electoral process.* The extraordinary nature of this remedy, affecting as it does the rights of stockholders who were victims, not perpetrators, of past wrongs, calls for close judicial scrutiny of the circumstances of its termination and the resumption of stockholder management. To preserve the integrity of this extraordinary remedy, strict standards of conduct for Court-appointed directors are necessary.

- B. As Fiduciaries and Agents of a Federal Court, the Interim Directors Should Be Disinterested and Should Not Be Allowed to Transform the Drastic Provisional Remedy of the Appointment of Interim Court-Appointed Directors into Permanent Management.

The Final Judgment specified that the Board appointed pursuant to its mandate be a "new interim independent board of directors" and required that "none of [the appointees] shall previously have served as a member of the Board" (A-16) The wholesale replacement of the prior Board was found necessary in view of allegations that the former management had participated in Vesco's alleged fraud upon other companies and the investing public. The appointment

* See, e.g., SEC Rel. No. 34-13482 (April 28, 1977).

of "interim independent" directors presumed the need for disinterested persons to serve in that capacity, persons who not only were unconnected with the prior management but who would be capable of guiding the company in compliance with the Court's injunctive order and remedying the effects of the past fraud alleged in the complaint.

The drastic relief of permitting the Commission and the Court to usurp the traditional functions of stockholders in this case, as in others, has been justified as a temporary measure necessary to remedy past violations. The use of Court-appointed directors, however, should not be permitted to be used as a foothold for implanting new permanent management -- a power clearly in excess of the Commission's mandate and beyond the equity powers of the federal courts.

The Court-appointed Directors should be regarded as officers of the Court since they were appointed by the Court to serve as its agents. See Smallwood v. United States, 358 F. Supp. 398, 404 (E.D. Mo. 1973) aff'd without opinion, 486 F.2d 1407 (8th Cir. 1973); cf., Securities and Exchange Commission v. Beisinger Industries Corp., 421 F. Supp., 691, 696 (D. Mass. 1976). As officers of the Court, they should not be permitted to utilize their court appointments to advance their own personal interests at the expense of the stockholders of ICC. Cf., Mosser v. Darrow, 341 U.S. 267, 271 (1951).

Intervenors urge that it is axiomatic that it would violate the terms of their judicial appointment and their obligations to the Court and to stockholders for the interim directors to use their positions of trust to secure management control for themselves. The Court-appointed directors of ICC argued below (A-319) that they were not receivers or trustees and that, therefore, they were not subject to the strict requirements of disinterested independence that govern the conduct of those officers of the Court. Intervenors, however, urge that, whatever "label" is used, these Court-appointed directors are undeniably agents of the Court and fiduciaries. To hold Court-appointed directors to a lesser standard than that applied to receivers, attorneys, trustees and other court officers would subvert the very premise for appointing them in the first place and undermine the integrity of the remedy.

These Court-appointed directors have managed ICC's affairs for five years without the normal checks of annual election and possible removal by the stockholders which ordinarily remind directors of their responsibility and accountability to stockholders. The unusual circumstances presented by the imposition of this extraordinary remedy place Court-appointed directors under a fiduciary duty not to abuse

their judicially-created positions of trust or even to appear to be abusing that trust. The events which led to the appointment of a Special Master in this case demonstrate, without more, the need for a clarification of the fiduciary nature of the role of Court-appointed directors and a limitation on the potential for abuse inherent in a situation where control of a corporation is taken away from its stockholders and placed in the hands of persons serving as agents of the federal courts.

II

COURT-APPOINTED DIRECTORS SHOULD BE PRECLUDED FROM BECOMING OFFICERS OR DIRECTORS OF THE COMPANY AT THE END OF THEIR JUDICIAL APPOINTMENTS IN ORDER TO PRESERVE THEIR DISINTERESTED STATUS AND TO AVOID THE APPEARANCE OF IMPROPRIETY.

A. A Prophylactic Rule Of General Application Is Necessary To Preserve The Neutrality And Independence Of Court-appointed Directors.

Court-appointed directors can scarcely remain "disinterested" if they may anticipate the possibility of turning their temporary appointments into personal sinecures. Allowing Court-appointed directors to perpetuate themselves in office if they so desire creates, at the very least, the appearance of impropriety and places them in a situation ripe with conflicts of interest. In stating that they represent the interests not only of stockholders but also of "creditors and persons who had been injured by reason of the matters alleged in the SEC

complaint" (A-50), the interim board has conceded that their obligations differ from those of ordinary directors. This potential for conflicting interests vis-a-vis the corporation's stockholders is also demonstrated in their preliminary proxy material where they stated that it is "inappropriate as Court-appointed directors to purchase [ICC] stock." (A-226) Intervenor urged below that it is equally inappropriate for Court-appointed directors to succeed themselves in office.*

This case is the first instance found in which Court-appointed directors have, over the objection of stockholders, sought election by the stockholders when their temporary judicial tenure ends. As a result, no direct precedent can be referred to for guidance.**

* For example, as Court-appointed directors, the obligations of the ICC interim board, as they have stated them, included "aiding in the . . . assertion of claims for the benefit of . . . persons who had been injured by reason of the matters alleged in the SEC Complaint" (A-50). Any such person who has a claim against ICC would, of course, be an adversary of a normal board of directors and such persons' interests are necessarily adverse to those of ICC's stockholders.

** In the Court below, the Court-appointed directors asserted that there was a precedent for appointed directors nominating and succeeding themselves in the case of Poirier v. Welch, 233 F.Supp. 436 (D.D.C. 1964). That case, however, did not involve Court-appointed directors but the initial directors of the Communications Satellite Corporation ("Comsat"), a creature of federal statute. The initial directors of Comsat had been designated by the President pursuant to the Communications Satellite Act of 1962 (47 U.S.C. §§701 et seq.). Unlike the directors of ICC, these Comsat directors were not appointed pursuant to the equity powers of the federal courts and the stockholders of Comsat had never been deprived of the opportunity to elect or remove directors by order of a federal court or otherwise.

Since the interim directors, like receivers and trustees in bankruptcy, are judicially appointed, an obviously analogous area is that of a receiver or a trustee in bankruptcy.

In the analogous situation of a trustee in a reorganization proceeding under Chapter 10 of the Bankruptcy Act (11 U.S.C. §501 et seq.), the Commission has taken the position that the trustee should be disabled from becoming president or assuming a position of importance with the reorganized company. See Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414 (1967) and the Commission's Brief in support of the position taken by the petitioner Stockholders Committee in the Supreme Court. The Commission argued in that case that one of the major reforms for corporate reorganizations under Chapter 10 of the Bankruptcy Act was the requirement that the trustee be "disinterested" in order best to carry out the reorganization process. A hope or interest by the trustee in future employment would be materially adverse to the interests of creditors and shareholders, because the trustee might be influenced in the solutions proposed. To guarantee that a trustee is totally disinterested and that a plan of reorganization is free from taint, the Commission recommended that a trustee be precluded from assuming the presidency or any other position of importance with the reorganized company. (Commission's Brief at pp. 22-33.) In the TMT Trailer Ferry, Inc.

case, the Supreme Court, reversing and remanding on other grounds, did not decide the question. The Fifth Circuit, in remanding to the District Court, had determined that the proposed Plan of Reorganization "is not to be rejected merely because [the Trustee] would become president of the reorganized company", In Re TMT Trailer Ferry, Inc., 334 F.2d 111 (5th Cir. 1964), but stated:

"However, it is our opinion that a trustee would not be disinterested within the meaning of 11 U.S.C.A. §558 if the proponents of a plan assured him of emoluments and security rather than merely nominating him for approval by the court subject to the usual control of the Board of Directors. Equity must exact from it the forebearance of all opportunities to advance self-interest that might bring the disinterestedness of their position into question [citations omitted]" 339 F.2d at 120.

In the TMT Trailer Ferry, Inc. case, unlike this case, there was a statutory requirement that a trustee be "disinterested" and the Commission argued that the rule which it sought, barring a trustee from assuming a major role in the reorganized company, flowed from the statute and the requirement that the Trustee be "disinterested". In this case, the importance of the independence of Court-appointed directors is apparent from the provisions of the Final Judgment which established a new "independent" board of directors and established criteria for the persons to be appointed to insure their independence from previous management. (A-17)

The absence of an equivalent statutory framework governing the independence of Court-appointed directors makes a prophylactic rule even more essential to safeguard the Commission's objectives and the integrity of the remedial device. The replacement of the entire pre-existing board of ICC with directors acceptable to the staff of the Commission was a remedy sought by the Commission pursuant to the generalized authority granted it under Section 21(e) of the Securities Exchange Act (the "Exchange Act")* to bring an enforcement action against any person "engaged or about to engage in any acts or practices which constitute or will constitute a violation of [these] provisions." Under §21(e), the Commission has sought a wide range of relief ancillary to an injunction, such as the appointment of a receiver or independent directors. See e.g., Securities and Exchange Commission v. Texas Gulf Sulphur Co., 446 F.2d 1301, 1307-08 (2d Cir. 1971), cert. denied, 404 U.S. 1005 (1971).

This Court was empowered to appoint a new interim board of directors for ICC and to supervise its conduct by virtue of the authority granted federal courts by Congress to enforce any liability or duty arising under the federal

* 15 U.S.C. §78u(e)(1970).

securities laws.* Thus, the exclusive source of authority supporting the ancillary relief obtained by the Commission in this enforcement action is the general equity jurisdiction of the federal courts which the Commission has requested to carry out the purposes of the Exchange Act and the protection of investors. As a creation of the general equity powers of the federal courts and the securities laws, a Court-appointed board of directors must be subject to standards of conduct commensurate with the basis for its authority.

The remedy of Court-appointed interim directors was conceived as an alternative to a receivership** and has potentially greater flexibility and other advantages, but it

* Securities Act §22, 15 U.S.C. §77v; Exchange Act §27, 15 U.S.C. §78aa.

** See, Comment, Equitable Remedies, supra, 123 U. Penn. L. Rev. at 1213-14.

"It is the SEC staff's position that the imposition of interim directors and special counsel is an alternative to a receivership and will be requested most often in cases where there are grounds for the appointment of a receiver. However, the failure to identify these remedies adequately as modified forms of receivership (for fear that the label will invoke a procession of horrors) gives them the appearance of normalcy which is precisely the appearance the Commission and often the defendant corporation are seeking. But this failure obscures the facts that flexible alternatives to the receivership should be instituted only in extreme cases where management has effectively forfeited its right to control the corporation, and that they are unusual and temporary measures designed only to bring the corporation back into compliance with applicable law, to ascertain the current state of affairs, and make required disclosures."

presents the danger that the appearance of normalcy generated by the use of the term "directors" may obscure the temporary nature of the device, the need for both continued judicial supervision and the application of the strictest standards applicable to the conduct of Court-appointed directors. Since the provisional remedy of appointing interim directors lacks the specific guidelines afforded by a traditional equity receivership and Court-appointed directors are insulated from responsibility and liability except for gross negligence, more, not fewer, precautions are needed so that these fiduciaries neither abuse their positions of trust nor create the appearance of a conflict of interest. This is especially true since, unlike receivers and trustees, whose authority is strictly limited absent specific judicial authorization, Court-appointed directors are given considerable latitude in fulfilling their duties.

The pattern of conduct by the Court-appointed Board of ICC which necessitated the appointment of a Special Master illustrates the potential for abuse inherent in the conflicting position assumed by the interim directors of ICC when they determined to seek election by the stockholders and demonstrates the need for a prophylactic rule of general application prohibiting Court-appointed directors from succeeding themselves. Here, but for the opposition of the Intervenor, the Court-appointed Board would likely have thrust themselves into

office without any opposition. Obviously, the actions of the interim directors were calculated to benefit themselves - not the interests of ICC stockholders - and their machinations demonstrate that the temptation to use their Court-appointed offices to preserve or enhance their personal positions overcame them.

Intervenors argued below that it was improper for the Court-appointed directors to run for election at all - even if they did not use all of the advantages of incumbency - because, among other things, the mere fact that they are in office gives the Court-appointed directors a significant advantage over the Intervenors or any stockholder desiring to seek election as a director.* Intervenors argued below that it is inconsistent with the legitimate purposes of this provisional remedy ever to permit Court-appointed directors to seek election as directors or the emoluments of corporate office after their court-stewardship has ended. Absent a rule prohibiting efforts to succeed themselves, the potential will always be present during the tenure of Court-appointed directors that their conduct will be altered by the expectation or possibility of succeeding themselves. Even if Court-

* It is well-established that incumbents enjoy enormous advantages over opposing groups in a proxy solicitation contest.

appointed directors are not tempted to alter their conduct, the potential for this influence (consciously or unconsciously) is sufficient to create the appearance of dual loyalty or conflict of interest. Such a situation at best undermines the ability of the director to perform his court-appointed tasks and could undermine the integrity of the remedy and its future utility.

Absent application of such a rule in this action,* the result may be that future Court-appointed directors will begin to think of themselves as incumbents from the start, which is certainly not the intention of the Commission or the Court in implementing the remedy of replacing corporate management with Court-appointed directors.

Intervenors believe that unless a Court-appointed director is completely independent and disinterested, that is, free from any factor that, consciously or unconsciously, might tend to cause personal considerations to influence him, he is not able to perform his substantial responsibilities and serve the function intended by the Court without at least the potential for and certainly the appearance of impropriety. We urge, therefore, that a court-appointed director may not, consistent with his role, accept or contemplate employment

* If Intervenors' appeal is unsuccessful, a precedent will have been set that it is permissible for Court-appointed directors to utilize their offices to enhance their chances of permanent employment.

with the corporation after the tenure of his judicial appointment. Intervenors believe that the public interest in insuring the single-minded devotion of Court-appointed directors requires the strict rule we urge.

Intervenors believe that the Court below, in permitting the directors to run for election, has also overlooked the prejudice to the Intervenors and other ICC stockholders which results. The Intervenors, like all ICC stockholders, have been deprived of their rights as stockholders for almost five years by order of a federal court. For the reasons indicated above, the Court-appointed directors are, with the imprimatur of the Special Master and the Court, attempting to transform their court offices into permanent management positions with ICC. At the very least, the Intervenors are put in a competitive disadvantage in seeking election themselves by the Court's Order of November 22, 1977. Since the Court-appointed directors will have been in office for five years, they will enjoy a significant "recognition" advantage in an election, will be perceived as "incumbents" and will also be perceived as enjoying the "approval" of the Commission and the federal court. Common sense dictates that, armed with these advantages over all other possible candidates, the Court-appointed directors will enjoy even greater advantages

than the considerable advantages possessed by incumbent directors who trace their incumbency to stockholder action rather than action of the Commission and the federal judiciary. Conferring these advantages on agents of a federal court is certainly an unprecedented use of this extraordinary remedy and demonstrates the need for a prophylactic rule of uniform application. In fact, this judicially created electoral advantage is itself sufficient reason for a general rule; otherwise, in appointing interim directors, there will always be a risk that the federal courts may be effecting a permanent change in the management of a corporation in the guise of a provisional remedy.

B. The Facts of This Case Illustrate the
Need for the Prophylactic Rule Sought

We have discussed above in considerable detail the efforts of the Court-appointed directors of ICC to use company funds and the other advantages of incumbency to facilitate their election. This conduct was clearly inimical to the best interests of ICC stockholders generally and was obviously calculated to inhibit the efforts of the Intervenor to return the management of ICC to its stockholders. While the possibilities for abuse by court-appointed directors generally are infinite, there is clear evidence of abuse in this case.

Intervenors urge that to maintain the independence of Court-appointed directors it is necessary to prevent even the possibility of such conflicts of interest. As the Supreme Court has stated, the evil is not that conflicting "interests are always corrupt but [that] they are always corrupting" Mosser v. Darrow, 341 U.S. 267, 277 (1951). Adherence to a strict standard of independence and assurance that there will be no appearance that the standards are being ignored can only be accomplished if all Court-appointed directors are disabled from serving in permanent positions with the corporation when their court appointments are terminated.* At the very least, in cases such as this, where a conflict of interest between the Court-appointed directors and the stockholders has already been demonstrated, it is unconscionable to condone such abuse of their offices by agents of the federal courts.

* It should be noted that the Plan (as adopted by the Court) does not restrict any of the Court-appointed directors from serving as salaried officers of ICC after the election of directors. At least with respect to Mr. Shinn, it can reasonably be expected that he would continue as President and Chief Executive Officer of ICC if the "slate" proposed by him and the other Court-appointed directors were elected.

C. The Reasons Stated in the Special Master's Plan for Permitting the Court-Appointed Directors to Seek Election Are Hypothetical, Erroneous or Insufficient When Contrasted with the Compelling Reasons for Refusing To Permit These Court-Appointed Directors To Seek Election.

The Plan enumerates two separate reasons for rejecting Intervenors' argument and determining that it is appropriate for the Court-appointed directors to run for election. (A-456) First, the Special Master pointed to the possibility that the exclusion of the Court-appointed directors would deprive ICC stockholders of the opportunity to benefit from the experience and knowledge of ICC's affairs accumulated by the Court-appointed board of directors. (Id.) This argument, however, completely ignores other alternatives which would take advantage of the benefits of these directors' experience without transforming them into permanent management, such as retaining them in an advisory capacity to the extent their services are needed. The Commission had recommended that the Special Master be empowered to adopt a plan for "effecting the transition." (A-372) The Plan could have provided for the retention of the Court-appointed directors in some capacity other than elected directors, but the Plan makes no mention of alternatives. The Special Master apparently viewed his options as being limited solely to accepting or rejecting the Court-appointed directors as candidates. Another obvious fact

overlooked by the Special Master is that there would presumably be no reason why these interim directors would not voluntarily cooperate with a new stockholder-elected board to fulfill not only the objective of a smooth transition period but also the duties of their Court-appointed offices.

This justification for permitting the interim board to succeed themselves also completely ignores the fact that the four interim directors have selected "running mates" who (other than their lawyer, Milton S. Gould) have no experience with ICC's affairs to contribute but who are to be nominated together with the Court-appointed directors as a single "slate". If elected, these directors will become ICC's permanent management, armed with all of the advantages of incumbency, unfettered by court supervision or monitoring by the Commission; if elected, they will not be a "transition" board.

Finally, Intervenor's urge that even if a smooth transition period could not be achieved by other less dangerous alternatives, this goal, however, salutary, does not, on balance, merit abandoning completely the advantages of denying to all Court-appointed directors the corrupting temptation of seeking election themselves. These advantages can only be accomplished by adopting the general rule urged and overturning the precedent established by the District Court's order.

The second justification offered in the Plan was premised on the assumption that if the Court-appointed directors

were declared ineligible, the election could go by "default" to the Intervenor. This justification is, at best, hypothetical, since, on the facts before the Special Master, there was no possibility of a single slate "default". The persons who accompany the Court-appointed directors on their slate could, and presumably would, run for election even if the Court-appointed directors did not. Since the date of the Special Master's Plan it has become apparent that this fear of a "default" was unfounded since more than fifty persons now seek nomination.*

The only other justification proffered by the Special Master was that it was "entirely appropriate to preserve for the stockholders the opportunity to decide whether the election of the present directors to the new board is in their best interests." (A-456) Like the other two justifications, this argument ignores the reasons why a general rule prohibiting Court-appointed directors from seeking election by the stockholders is necessary (a) to preserve the integrity of the use by the Commission and the federal courts of the remedy of Court-appointed directors, (b) to avoid conflicts of interest during the tenure of Court-appointed directors and (c) to

* This development occurred subsequent to the transmittal of the Plan by the Special Master to Judge Stewart and the entry of Judge Stewart's Order. While outside the record, it demonstrates that this second justification was hypothetical at best.

ensure that there is not even the appearance of impropriety either during or after the tenure of Court-appointed directors. Stockholder "re-election" of Court-appointed directors not only conflicts with the goal of maintaining disinterested and independent directors, but is inappropriate since Court-appointed directors like the directors of ICC have completely controlled the flow of information to stockholders and, since they must be perceived as incumbents, they will enjoy the advantages of judicially created (and Commission approved) incumbency regardless of any measures taken by the Special Master in an effort to ensure "neutrality".

Leaving the question of their election up to the stockholders only makes sense if the Court-appointed directors should be allowed to run in the first place and totally ignores the practical advantages of incumbency which will be enjoyed by the Court-appointed directors over every other candidate.

In sum, each justification offered in the Plan for permitting the Court-appointed directors to seek election is either hypothetical or ignores the fiduciary nature of the status of Court-appointed directors and the intrusion of the federal courts into the permanent management of a corporation which necessarily results if Court-appointed directors are to be allowed to become permanent managers of the corporation.

Even to the extent that the justifications mentioned in the Plan are real rather than hypothetical, they fail, on balance, to warrant legitimizing the conflicts of interest, both real and apparent, faced by interim Court-appointed directors as a result of their peculiar, judicially-created, fiduciary status. Finally, in allowing these Court-appointed directors to be candidates, the Plan and the District Court's order condones the past conduct of these Court-appointed directors, including their continuing use of corporate funds to enhance their own election, and establishes a dangerous precedent.

Intervenors urge this Court to adopt a general rule prohibiting Court-appointed directors from seeking election as directors or serving as officers of the corporation they have managed as court officers. Absent application of such a rule to this case, the long-suppressed rights of the Intervenors and other ICC stockholders will be prejudiced in the forthcoming election. In addition, ignoring the impropriety of actions by ICC's Court-appointed directors in this case may well impair the integrity of the remedy of Court-appointed directors as an alternative to receivership in future cases and infect all such cases with the appearance of impropriety.

CONCLUSION

The District Court's order below should be reversed insofar as it adopted those aspects of the Plan of the Special Master which permit the Court-appointed directors of ICC to seek election as directors and serve as officers of ICC after the Court-stewardship of ICC has expired.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

LYNN PETRI , being duly
sworn, deposes and says;

I am over the age of eighteen (18) years and am not a party to this action.

On the 10th day of January , 19⁷⁸, I served
a copy of the annexed paper upon
(SEE ANNEXED LIST)

by depositing a true copy of the same in a properly addressed postpaid wrapper in a regularly maintained official depository under the exclusive care and custody of the United States Post Office Department located in the City, County and State of New York.

Sworn to before me this
10th day of January, 1978.

ALICE M. WORTH
Notary Public, State of New York
No. 31-4647783
Qualified in New York County
Certificate Filed in Kings County
Commission Expires March 20, 1978

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